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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

NO. 80-6864

ORIGINAL

WILLIAM GROSECLOSE,

Petitioner,

V.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the statutory aggravating circumstance in Tenn. Code Ann. §39-2404(i)(5) is unconstitutionally void for vagueness and overbreadth.

2. Whether the sentence of death as applied to petitioner was disproportionate.

3. Whether the Tennessee statutes and rules on comparative review of death sentences render the imposition of a death sentence unconstitutional.

4. Whether the non-inclusion of final argument, to which no objection was raised and on which no issue was questioned in the motion for new trial, deprives petitioner of due process of law.

5. Whether excusing prospective jurors who made it unmistakably clear that they could not consider imposing a sentence of death violated petitioner's right to an impartial jury..

6. Whether the issue concerning handcuffs can be properly raised since there is no proof in the record that any prospective juror saw the petitioner in handcuffs.

7. Whether the Tennessee Supreme Court properly evaluated the record and found the minor Bruton violation to be harmless error.

8. Whether the jury instructions given were inconsistent with case law on the imposition of a sentence of death.

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OPINIONS BELOW

The opinion of the Tennessee Supreme Court is reported at 615 S.W.2d 142.

JURISDICTION

Petitioner seeks to invoke this court's jurisdiction under 28 U.S.C. § 1257(3). Respondent submits that this record does not present a substantial federal question. The judgment of the Tennessee Supreme Court was entered on February 17, 1981. Petitioner's petition to rehear was denied on April 27, 1981. Petitioner timely filed his Petition for Writ of Certiorari with this court.

STATEMENT OF THE CASE

William Edward Groseclose was indicted with Ronald Rickman, Barton Mount, and Phillip Britt for first degree murder by the Shelby County Grand Jury in September 1977 (R.[orders, pleadings, and minute entries] 2-5, 25-28). The jury selection process began on February 13, 1978, continued through, and was completed on February 17, 1978. During this voir dire, seventeen prospective jurors were excused by the trial judge because they explicitly expressed an inability to follow the law and instructions of the court on the death penalty. (R. [transcript of voir dire] 3, 22-26; 55-58; 294-297; 309-313; 315-316; 373-378; 426-431; 625-630; 711, 714-724; 743-748; 752-758; 995-1005; 1007-1016; 1042-1046; 1102-1119; 1194, 1196-1199, 1202-1206; 1277-1281).

The seven day trial commenced on February 18, 1978 and was completed on February 28, 1978. After due deliberation, the jury found petitioner and his two co-defendants Britt and Rickman guilty of first degree murder.

(R. [orders, pleadings, and minute entries] 160-161). During this phase of trial, after extensive testimony concerning the admissibility of co-defendant Britt's statements (R. [transcript of trial] 1116-1368), the trial judge ruled that these statements were admissible with certain redactions. (R. [transcript of trial] 1374-1383). The Assistant District Attorney General reviewed the redacted statement for Sergeant East prior to the resumption of his testimony. (R. [transcript of trial] 1383).

In his testimony, Sergeant East made the following statement concerning an oral statement made by co-defendant Britt prior to Britt's giving either his taped or typed statement. Britt stated that "he had become involved approximately four weeks ago when he was approached by Bill Groseclose about having Debbie Groseclose killed. He stated--." (R.[transcript of trial] 1388). At that time, Britt's counsel moved for mistrial, based on Bruton v. United States, 391 U.S. 123 (1968) and White v. State, 497 S.W.2d 751 (Tenn. Crim. App. 1973). Petitioner Groseclose's counsel joined this objection (R. [transcript of trial] 1389). The state agreed that this testimony was objectionable and indicated that it was as surprised as the court and defense counsel by this statement. (R. [transcript of trial] 1391-1392). After consideration, the court denied the motion for mistrial (R. [transcript of trial] 1392-1394) and instructed the jury as follows:

> "Gentlemen of the jury: The court instructs this jury that if there is any evidence tending to show accusations in statements made against any defendant out of his presence and unheard by him, you are instructed not to consider such statements or accusations for any purpose whatsoever in determining the guilt or innocence of any defendant. Do I make myself clear? [all jurors nodded affirmatively.]" (R. [transcript of trial] 1395).

Subsequently, during the penalty phase of the trial, Britt testified and affirmed the contents of each of his statements including the inculpation of petitioner Groseclose. Britt was available for cross-examination at that time. (R[transcript of trial] 2094).

On March 1, 1978, the sentencing hearing began. It continued through and completed on March 3, 1978. After due deliberation, the jury returned its verdict on March 4,, 1978, fixing the sentence for petitioner Groseclose and defendant Rickman at death. The jury unanimously found the following statutory aggravating circumstances: (1) the defendant employed another to commit murder for remuneration; and (2) the murder was especially heinous in that it involved depravity of mind. The jury unanimously found that there were no mitigating circumstances sufficiently substantial to outweigh the listed statutory aggravating circumstances. (R.[orders, pleadings, and minute entries] 167).

Petitioner Groseclose filed a timely motion for new trial and amendment thereto but did not raise any issues concerning improper excusal of prospective jurors, the court's jury instructions, the prospective juror's "viewing" of petitioner in handcuffs, or closing argument of counsel. (R.[orders, pleadings, and minute entries] 206-207, 209). This motion was overruled. The petitioner appealed to the Tennessee Supreme Court which affirmed the judgment.

REASONS FOR DENYING THE WRIT

Respondent insists that the Tennessee Supreme Court correctly affirmed the trial court's judgment approving the jury verdict finding the petitioner guilty of first degree murder and fixing his punishment at death. The Tennessee Supreme Court did not decide a federal question of substance not heretofore determined by this court or decide such a question in a way not in accord with the applicable decisions of this court. Nor did the Tennessee Supreme Court decide a federal question in a way in conflict with another state court of last resort or of a federal court of appeals. See Supreme Court Rule 17.1. There being no special and important reasons for a grant of certiorari in this case, the court in its sound judicial discretion should deny the writ sought here.

ARGUMENT

I.

TENN. CODE ANN. § 39-2404(i)(5) IS NOT UNCONSTITUTIONALLY VAGUE OR OVERBROAD.

Petitioner contends that Tenn. Code Ann. § 39-2404(i)(5), an aggravating circumstance, which provides "the murder was especially heinous, atrocious, or cruel in that it involved tortue or depravity of mind," is vague and unconstitutional. The same allegation was raised in Proffitt v. Florida, 428 U.S. 242, 255-256 (1976) in which this court held that an identical aggravating circumstance under the Florida death sentence statutes was not impermissibly vague as it had been construed by the Florida Supreme Court. See Gregg v. Georgia, 420 U.S. 153, 200-203 (1976). See also Spinkellink v. Wainwright , 578 F.2d 582, 610-612 (5th Cir. 1978), cert. denied 440 U.S. 976 (1979).

The Florida Supreme Court construed this provision

to be directed at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 183 So.2d 1, 9 (Fla. 1973). The Florida Supreme Court also recognized that this provision was directed by its legislature at something "especially" heinous, atrocious or cruel. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). In Dicks v. State, 615 S.W.2d 126, 132 (Tenn. 1981), the Tennessee Supreme Court approved these constructions of this aggravating circumstance. The court specifically found this construction applicable to this case. 615 S.W.2d at 151. The trial judge's instructions to the jury in the instant case are compatible with these constructions. (R.[transcript of trial] 2447). Such a construction is applicable in the instant case. The factual circumstances which the jury found in the instant case, the death by systemic hyperthermia, "cooking," of this victim in the trunk of her car which had been abandoned with the participants' knowledge that the victim was alive, show that such an interpretation is applicable in the instant case. 615 S.W. at 148 and 151. These facts do not show an improper application of this aggravating circumstance. See Godfrey v. Georgia, 446 U.S. 420 (1980).

II.

THE SENTENCE OF DEATH IS NOT DISPROPORTIONATE IN THIS CASE.

Under Tenn. Code Ann. § 39-2406(c) the Tennessee Supreme Court is required to determine whether the evidence supports the jury's finding and whether or not the sentence of death is "excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." In this case, the

Tennessee Supreme Court applied this standard finding that "By any standard of comparison, where the public policy of a jurisdiction, as reflected in its statutes, authorizes the death penalty, the facts and circumstances of this case justify the action of the jury and of the trial judge in imposing it upon these appellants [Groseclose and Rickman]"615 S.W.2d at 150. When this issue was again raised in the petition to rehear the Tennessee Supreme Court found that "[a] case with facts so aggravated and shocking can scarcely be conceived, and no similar case or cases in which the death penalty has not been imposed in circumstance similar to those shown in this record has come to our attention." Id. Such findings show that a sufficient proportionately review has been conducted. See Proffitt v. Florida, 428 U.S. 242, 259 n. 16 (1976); State v. Shaw, 255 S.E.2d 799(S.C.), cert. denied 444 U.S. 957 (1979).

Petitioner Groseclose also contends that the application of the death penalty to him is disproportionate since co-defendant Britt did not receive a death sentence. The Tennessee Supreme Court properly rejected this argument. The petitioner's argument would support a mandatory death penalty such as those found unconstitutional in Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976). Such a death penalty lacks the focus on the character and propensities of the individual defendant. In the instant case, co-defendant Britt's testimony shows his youthful age, 20 years; his repentance at having committed this crime, which he acknowledged committing; and the possible influence or domination by co-defendant Rickman in his participation. None of these factors are available for petitioner Groseclose. He was the initiator of

this crime. In fact, he used the crime as a means for obtaining a release from marital and financial problems. In Austin v. State ____ S.W.2d ____ (Tenn. 1981), the jury also found statutory aggravating circumstance 4, inter alia, outweighed any mitigating circumstances. In that case a death sentence was imposed on the individual who had hired other persons to kill the sole witness against him in a criminal case.

Petitioner Groseclose also complains that the jury should have been allowed to hear the evidence of Ralph Hadley and Hugh Stanton concerning negotiations of a guilty plea. This evidence refers only to co-defendant Britt (R.[transcript of trial] 1956-2010) and is irrelevant to the jury's consideration in this particular case. Groseclose, 615 S.W.2d at 149-150. Lockett v. Ohio, 438 U.S. 586, 604 n. 12 (1975).

III.

THE TENNESSEE PROVISIONS FOR APPELLATE REVIEW ARE CONSTITUTIONALLY SUFFICIENT.

Tenn. Code Ann. § 39-2406 is patterned after the appellate provisions of Georgia's statutes. Tenn. Code Ann. § 39-2406 does not, however, require specific referral to the cases compared in determining the proportionality of the sentence as is required by the Georgia statute. See Gregg v. Georgia, supra 420 U.S. at 205 n. 56. However, this court in Proffitt v. Florida, supra 428 U.S. at 259, held that where the appellate court made such a proportionality comparison, the statute, as interpreted, provided for sufficient appellate review. This court made such review in this case. 615 S.W.2d at 150.

IV.

THE NON-INCLUSION OF THE TRANSCRIPT OF ARGUMENT OF COUNSEL DOES NOT DEPRIVE PETITIONER OF DUE PROCESS.

Trial counsel for petitioner Groseclose certified the trial transcript as complete for purposes of his appeal (R. 238-239; Volume 28). Petitioner raised no issue concerning this argument. The non-inclusion of this argument does not show a due process violation or warrant the grant of the writ of certiorari. See Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, 96 (1978) cert. denied 439 U.S. 991 (1978).

V.

PROSPECTIVE JURORS WHO MADE IT UNMISTAKABLY CLEAR THAT THEY COULD NOT CONSIDER THE DEATH PENALTY WERE PROPERLY EXCUSED FOR CAUSE.

In Witherspoon v. Illinois, 391 U.S. 510 (1968) and Lockett v. Ohio, 438 U.S. 586 (1978), this court held that the trial judge could properly excuse for cause any juror who explicitly expresses an inability to follow the law and instruction of the trial judge on capital punishment. Despite petitioner's not having raised this issue in his motion for new trial, the Tennessee Supreme Court after a complete review of the record concluded that these prospective jurors were properly excused for cause and noted that petitioner had not used his peremptory challenges.

Petitioner alleges that prospective juror Rose (R[transcript of voir dire] 1102-1119) constitutes the "most striking example" of the erroneous application of Witherspoon. This individual however states in response to questioning from the trial judge that under no circumstances could he vote to apply the death penalty. "I don't see how any evidence could be presented to make

me vote for the death penalty." (R.[transcript of voir dire] 1119). The trial judge thus properly excused this prospective juror for cause under existing decisions of this court.

VI.

THERE IS NO EVIDENCE IN THIS RECORD THAT ANY PROSPECTIVE JUROR SAW THE PETITIONER IN HANDCUFFS.

The petitioner's allegation is not documented in this record. (R.[transcript of voir dire] 695-696). Groseclose, 615 S.W.2d at 148. Upon such a basis, this issue, which was not raised in petitioner's motion for new trial, does not warrant the granting of a writ of certiorari.

VII.

THE TENNESSEE SUPREME COURT PROPERLY CONCLUDED THE BRUTON VIOLATION IN THE GUILTY PHASE OF THE TRIAL WAS HARMLESS ERROR.

The Tennessee Supreme Court found that the reference to Bill Groseclose through the statement of co-defendant Britt as related by Sergeant East was harmless error. 615 S.W.2d at 147.

The mere finding of a violation of the Bruton [v. United States, 391 U.S. 123 (1968)] rule does not automatically require reversal. Schneble v. Florida, 405 U.S. 427 (1972); Harrington v. California, 394 U.S. 250 (1969). In Schneble, 405 U.S. at 430, this court stated "In some cases the properly admitted evidence of guilt is so overwhelming, the prejudicial effect of the co-defendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." Such a case is presented by the entire record

in this case. As this court stated in Schneble, "Judicious application of the harmless error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instruction, stares us in the face." 405 U.S. at 432.

The standard for reversal set forth in Schneble is "whether there is a reasonable possibility that the improperly admitted evidence contributed to the conviction." 405 U.S. at 432. That standard when applied to this case is not met. This statement was made on February 26, 1978 in proceedings which had begun almost two weeks prior to that time. Defendant Groseclose's name was mentioned only once. No further reference was made to defendant Groseclose during the statements of co-defendant Britt. Both Bart Mount and Pamela Baker Lindsey had previously testified that defendant Groseclose had initiated and made such contacts. (R.[transcript of trial] 204-207); 643-644; 651-655). Two other witnesses testified that petitioner Groseclose had approached them about killing or having his wife killed. (R.[transcript of trial] 191-192).

The evidence against defendant Groseclose is overwhelming. All of this evidence had been previously presented to the trial court at the time of this solitary mention of defendant Groseclose in the statement. Under such circumstances, a mistrial was not warranted.

VIII.

THE TRIAL JUDGE PROPERLY INSTRUCTED THE JURY DURING SENTENCING.

The Tennessee Supreme Court found, 615 S.W.2d at 147-148, that the jury instructions given closely followed the Tennessee statutes which the court had previously held constitutional. Houston v. State, 593 S.W.2d 267 (Tenn. 1980), cert. denied ____ U.S. ____, 101 S.Ct. 251, 66 L.Ed.2d 117 (1980). Petitioner Groseclose raised no objections to these instructions in the trial court and also seeks to rely on his co-defendant Britt's special requested instructions (R.[transcript of trial] 2454-2455). Under such circumstances, the petitioner has not raised an issue which warrants the granting of the writ of certiorari.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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